TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1931

No. [redacted] 18

DAVID W. PHILLIPS, COLLECTOR OF INTERNAL REVENUE, TWELFTH DISTRICT

vs.

DIME TRUST & SAFE DEPOSIT COMPANY, EXECUTOR OF THE LAST WILL AND TESTAMENT OF WILLIAM B. LEWIS, ETC.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

FILED FEB 11, 1931

(35643)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930

No. 721

DAVID W. PHILLIPS, COLLECTOR OF INTERNAL REVENUE, TWELFTH DISTRICT

vs.

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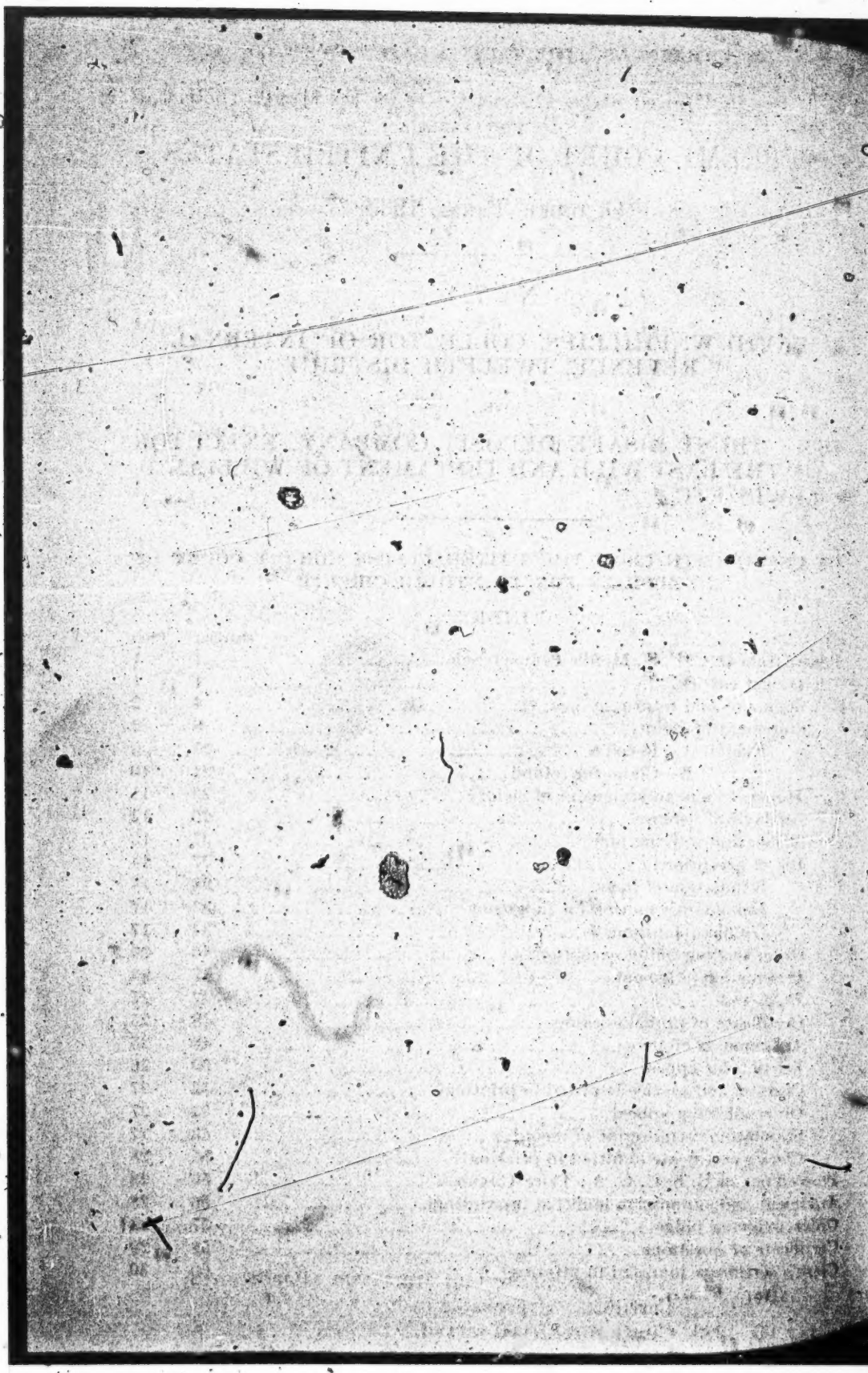

In the United States District Court for the Middle District of Pennsylvania

No. 2080, Jan. Term, 1928

DIME TRUST AND SAFE DEPOSIT COMPANY, EXECUTOR OF THE LAST Will and Testament of William B. Le..is, late of Shamokin Township, Northumberland County, Pennsylvania, deceased

vs.

DAVID W. PHILLIPS, COLLECTOR OF INTERNAL REVENUE, 12TH DISTRICT

Docket entries

Feb. 23, 1928.		Praecipe for summons in assumpsit.
" " "		Summons issued returnable at Scranton, second Monday of March next.
" " "		Plaintiff statement.
" " "		Duplicate original copy of plaintiff's statement handed to U. S. marshal.
" 28	"	Summons returned served, also copy of statement.
2 " "	"	Praecipe for appearance of attorneys for defendant.
Mar. 15	"	Affidavit of defense.
Apr. 2	"	Praecipe for trial list for May term, 1928.
May 9	"	Stipulation to try without a jury.
		Stipulation as to facts.
		Motion of defendant for judgment.
" 10	"	Motion for leave to amend plaintiff's statement and
" " "		Order allowing motion to amend.
Feb. 2, 1929.		Opinion and
" " "		Order that the Dime Trust & Safe Deposit Company have judgment against the defendant, David W. Phillips, collector of internal Revenue, 12th district, for the sum of $18,915.12 with six per cent in per annum from Sept. 10, 1926.
Mar. 1	"	Praecipe for judgment.
" " "		Judgment entered in favor of the plaintiff Dime Trust & Safe Deposit Company and against the defendant, David W. Phillips, collector of internal revenue for the 12th district, in the sum of $18,915.12 with interest from Sept. 10, 1926, in the sum of $2,799.43, making a total of $21,714.55.
3 May 14	"	Petition for appeal and
" "	"	Order allowing appeal.
" " "		Assignments of error.
" " "		Citation issued returnable in thirty days.
" 18	"	Acceptance of notice of appeal and assignments of error by Charles C. Lark, attorney for appellee.
" 20	"	Bill of exceptions and order that same be filed.
		Certificate of probable cause.
May 23, 1929.		Citation returned served.

In the United States District Court

[Title omitted.]

SIR: Issue summons in assumpsit in the above-stated case returnable March 12th, 1928.

CHARLES C. LANE,
Attorney for Plaintiff.

To A. O. Vorse, clerk,
Shamokin, Penna., February 21, 1928.

Summons and return

THE PRESIDENT OF THE UNITED STATES

To the marshal of the middle district of Pennsylvania, Greeting:

We command you that you summon David W. Phillips, collector of internal revenue, 12th district, late of your district, if he may be found therein, so that he be and appear before the judge of the District Court of the United States in and for the Middle District of Pennsylvania, at a session of the same court to be holden at Scranton, Pa., on the second Monday of March next, to answer to Dime Trust & Safe Deposit Company, executor of the last will and testament of William B. Lewis, late of Shamokin Township, Northumberland County, Penna., deceased, of a plea in assumpsit.

And have you then and there this writ.

Witness the honorable the judges of the said court at Scranton, Pa., this 23rd day of February, A. D. 1928, and in the one hundred and fifty-second year of the independence of the United States.

A. O. VORSE,
Clerk United States District Court.

Now, to wit, February 28th, 1928. Served the within summons on the within named David W. Phillips, collector of internal revenue, personally, by reading and making known the contents thereof to the said David W. Phillips and by leaving with the said David W. Phillips a true and attested copy of the within summons together with a copy of a plaintiff statement. Service was made in the city of Scranton, county of Lackawanna, and within the middle district of Pennsylvania.

So answers John H. Glass, U. S. Marshal.

GEORGE GREEN, *Deputy.*

6 In United States District Court

Plaintiff's statement of claim.

The plaintiff, Dime Trust & Safe Deposit Company, executor of the last will and testament of William B. Lewis, late of the township of Shamokin, county of Northumberland, and State of Pennsylvania, deceased, brings this suit against the defendant, David W. Phillips,

collector of internal revenue of the [illegible] district, for the recovery of the sum of [illegible] dollars and fifteen dollars and twelve cents ($[illegible]) with interest thereon from the 10th day of September, [illegible] action whereof the following is a statement:

First. William B. Lewis was, at and before the time of his death, a resident and citizen of the State of Pennsylvania and resided and was domiciled in the township of Shamokin, county of Northumberland, and State of Pennsylvania.

Second. By his last will and testament bearing date August 3, 1925, since his death duly probated and remaining on file in the office of the register of wills of Northumberland County, Pennsylvania, and recorded in the office of the register of wills of Northumberland County in Will Book 19, page 472, William B. Lewis appointed Dime Trust & Safe Deposit Company to be the executor thereof.

Third. William B. Lewis died testate at Shamokin Township, in the county of Northumberland, and State of Pennsylvania, on or about September 28, 1925.

Fourth. After the death of William B. Lewis and the probate of his will, Dime Trust & Safe Deposit Company, duly qualified as the executor of said last will and testament, but no testamentary on the estate of William B. Lewis, deceased, have been granted to Dime Trust & Safe Deposit Company, and it is now acting as such executor.

Fifth. Dime Trust & Safe Deposit Company is a corporation duly organized and existing under the laws of Pennsylvania, with its principal office in the borough of Shamokin, Northumberland County, Pennsylvania.

Sixth. On or about the 5th day of August, 1926, Dime Trust & Safe Deposit Company, the executor of the last will and testament of William B. Lewis, deceased, filed with the defendant, Dewitt W. Phillips, collector of internal revenue, twelfth collection district, at Scranton, Pennsylvania, its "Return for Federal Estate Tax" in duplicate.

Seventh. One original of said "Return for Federal State Tax" is in the possession of the defendant and the other in the possession of the commissioner. Both the defendant and the commissioner have been requested to furnish the plaintiff with a certified copy of the said "Return," which requests have been refused, and for that reason the plaintiff is unable to attach hereto a copy thereof. Said "Return" is, however, here specifically referred to and made a part hereof as if fully and completely set out herein.

Eighth. The return of property included in Schedule D-1, "Jointly Owned Property," was made by the plaintiff under protest as will therein more fully and at large appear.

Ninth. The return of jointly owned property included in Schedule D-1, is as follows:

(1) All that certain lot or piece of ground and one-half part of a certain other lot or piece of ground situate in the borough of

Shamokin, county of Northumberland, State of Pennsylvania, the same being lot number two (2) and the northern one-half part of lot number three (3) in block number sixty-five (65) as laid down, designated, and described on the general lithographed plot or plan of the said borough of Shamokin, known as number sixteen (16) South Sixth Street, Shamokin, Pennsylvania, valued at fifteen thousand ($15,000.00) dollars, which said lot and part lot were conveyed to William B. Lewis and Anna Laura Lewis, his wife, by deed of Charles C. Lark and Ruth G. Lark, his wife, by deed dated August 12, 1922, and recorded in the office for the recording of deeds in and for the county of Northumberland, Pennsylvania, in Deed Book No. 208, page 316, on August 19, 1922.

(2) All that certain tract or piece of land situate, lying, and being in the township of Shamokin, county of Northumberland and State of Pennsylvania, bounded and described as follows, to wit: Beginning at a point, a nail stake, in the south side of the public road leading from Shamokin (by the way of the first culvert of the Philadelphia & Reading Railway Company, north of the village of Weigh Scales) to Irish Valley; thence along other lands of the said Edwin Badman, south eight (8°) degrees west, five hundred and twenty-four (524) feet to a point, a stake and pike of stones; thence along other lands of the said Edwin Badman, north seventy-five (75°) degrees and twelve (12″) minutes west, three hundred and eighty (380) feet to a point, a nail stake; thence by other lands of the said Edwin Badman, north eighty-two (82°) degrees west, two hundred and ninety-eight (298) feet to a point, a nail stake; thence by other lands of the said Edwin Badman, north fourteen (14°) degrees and twelve (12″) minutes east, five hundred and ninety-six (596) feet to a point, a nail stake, in the south side of the said public road leading from Shamokin to Irish Valley, by the way of said culvert; thence running along the said public road, south seventy-two (72°) degrees and thirty (30″) minutes east, two hundred and ninety-six (296) feet to a point, a nail stake, in the middle of a private road leading southwardly through the said messuage, tract, or piece of land hereby conveyed; thence running along the said public road, south seventy-one (71°) degrees and ten (10″) minutes east, three hundred and twenty-seven (327) feet to a point, a nail stake, and place of beginning, conveyed to William B. Lewis and Anna L. Lewis, husband and wife, by deed of Edwin Badman and Mary R. Badman, his wife, dated November 5, 1919, and recorded in the office for the recording of deeds in and for the county of Northumberland in Deed Book No. 187, page 8, valued at twenty-five thousand ($25,000.00) dollars.

(3) All that certain property in the county of Pinellas, and State of Florida, described as follows: The east seventy-five (75) feet of [illegible] lot sixteen (16) and the east one-half (E½) of lot fifteen (15) of block thirteen (13) of Hall's Central Addition to [illegible] number two (2) of the city of St. Petersburg, Florida, according to the plat thereof, on file and of record

the office of the clerk of the Circuit Court of [illegible] Florida, in plat book number three (3), page [illegible], conveyed to William B. Lewis and Anna L. Lewis, his wife, by deed of Thomas I. Frost and Edith Frost, his wife, dated December 26, 1923, and recorded in the office of the clerk of the Circuit Court of the Sixth Judicial Circuit, county of Pinellas, State of Florida, on December 31, 1923, in book number 42, page 137, and valued at sixteen thousand ($16,000.00) dollars.

(4) Four thousand fully paid and nonassessable shares of the preferred capital stock of the par value of one hundred ($100.00) dollars each of Wm. F. Taubel, Inc., a New Jersey corporation, evidenced by eight certificates, numbers one to eight, inclusive, each for five hundred shares of seven per cent (7%) preferred stock in said corporation, dated September 18, 1924, issued to William B. Lewis and Anna Laura Lewis, valued at four hundred thousand ($400,000.00) dollars. This stock was originally issued to William B. Lewis and Anna Laura Lewis on September 10, 1921, and a change of name in the corporation having taken place the certificates for the same number of shares and for the same par value were surrendered to the company and the present eight certificates issued in place thereof so that William B. Lewis and Anna Laura Lewis became seized and possessed of said stock on September 10, 1921.

(5) Twenty-one thousand Roaring Creek Water Co., Shamokin, Penna., mortgage bonds due 1959, interest due November and May, at five and one-quarter per cent (5¼%) valued at nineteen thousand nine hundred fifty ($19,950.00) dollars and afterwards increased by the defendant and the commissioner to twenty thousand ($20,000.00) dollars. At the time of the decedent's death there had accrued four hundred and twenty ($420.00) dollars in interest on these bonds.

(6) Bond and mortgage of W. Allen Rich to Dime Trust & Safe Deposit Co., dated February 29, 1924, in the sum of $25,000.00, payable in six months from and after the date thereof, together with interest thereon at the rate of six (6%) per cent per annum, recorded in the office for the recording of deeds in and for the county of Northumberland, Penna., in Mtge. Book 110, page 238, and secured upon all that certain lot or piece of ground situate, lying, and being in the borough of Shamokin, county of Northumberland, and State of Pennsylvania, known, designated, and described on the general plot or plan of the said borough of Shamokin as lot number three (3) in block numbered twenty-three (23).

The above mortgage and bond accompanying the same were duly assigned, transfered, and set over unto William B. Lewis and Anna Laura Lewis, his wife, by assignment in writing, dated May 4, 1926, by Dime Trust & Safe Deposit Company, the mortgagee, which assignment is recorded in the office for the recording of deeds in and for the county of Northumberland in Mortgage Book 116, page 259. The principal amount due upon this mortgage at the time of the death of William B. Lewis was twenty-five thousand

($20,000.00) dollars, and the interest accrued at that time was three hundred fifty-four dollars and fifteen cents ($354.15).

(7) Note and mortgage of Geo. Clark, jr., et al., to William B. Lewis and Anna Laura Lewis, dated February 16, 1923, recorded in the office for the recording of deeds in and for the county of Northumberland in Deed Book 111, page 259, secured upon all that certain lot or piece of ground situate, lying, and being in the borough of Shamokin, county of Northumberland, and State of Pennsylvania, and known, designated, and described upon the general lithographed plot or plan of the said borough of Shamokin as lot number seven (7) in block number twelve (12). At the time of the death of William B. Lewis there was due upon this mortgage the sum of eighteen thousand ($18,000.00) dollars of the principal and one hundred twenty ($120.00) dollars interest.

(8) Note and mortgage of Ralph Rose and Maud Rose, his wife, to William B. Lewis and Anna Laura Lewis, dated January 11, 1924, recorded in the office of the clerk of the Circuit Court in and for the county of Pinellas and State of Florida in book number 13 24, page 225, and secured upon all the following-described land, situate, lying and being in the county of Pinellas and State of Florida, to-wit, the south forty-five feet of lots seventeen (17) and eighteen (18) of block "B" of Jackson's subdivision of the city of St. Petersburg, Florida, according to the plan thereof on file in the office of the clerk of the Circuit Court of Pinellas County, Florida, in plat book No. 1, page five (5).

At the time of the death of William B. Lewis there was due upon the principal of this note and mortgage the sum of six thousand ($6,000.00) dollars and the accrued interest was ninety-eight dollars and sixty-six cents ($98.66).

(9) Note and mortgage of William B. Hughes and Virginia Hustes, his wife, to William B. Lewis and Anna L. Lewis. Mtge. dated April 25, 1924, recorded in the office of the clerk of the Circuit Court of Pinellas County, Florida, in book —, page —.

Mortgage lot six (6) in block eleven (11) of Bayview addition to St. Petersburg, Florida. This mortgage was for the sum of seven thousand ($7,000.00) dollars, and at the time of Mr. Lewis's death there was due in interest two hundred thirty-two dollars and thirty-three cents ($232.33). (Note.—This mortgage has since been paid off to Anna Laura Lewis. The record thereof is, however, specifically referred to and made a part hereof as fully and effectually as if herein fully and completely set out.)

14 (10) Promissory note of Charles C. Lark and R. G. Lark to William B. Lewis and Anna Laura Lewis in the sum of ten thousand ($10,000.00) dollars, dated May 4, 1925. At the time of the death of William B. Lewis the principal amount of said note, to wit, ten thousand ($10,000.00) dollars, together with two hundred thirty-five ($235.00) dollars interest, was due thereon.

(11) Saving account No. 3209 in Dime Trust & Safe Deposit Company standing in the name of William B. Lewis or Anna L. Lewis.

On September 25, 1925, the date of William B. Lewis's death, there was a balance of forty-seven thousand nine hundred sixty-two dollars and eighty cents ($47,962.80) and the accrued interest thereon was eight hundred twelve dollars and thirty-three cents ($812.33).

(12) Checking account of William B. Lewis or Anna Laura Lewis in Dime Trust & Safe Deposit Co. on September 25, 1925, at the close of business showed a balance of fifteen hundred sixty-six dollars and sixty-six cents ($1,566.66).

(13) Household furniture appraised at eighteen hundred seventy-five ($1,875.00) dollars in the name of William B. Lewis and Anna Laura Lewis.

Ninth. The total valuations as fixed by the collector, the defendant, and the Commissioner of Internal Revenue upon the property enumerated in the next preceding paragraph was five hundred ninety-five thousand six hundred twenty-seven dollars and ninety-three cents ($595,627.93) dollars.

Tenth. At the time and times of the vesting of the title to each, every, and all of the several items of property of William B.
15 Lewis and Anna Laura Lewis enumerated and set forth in the next preceding paragraph William B. Lewis and Anna Laura Lewis were husband and wife.

Eleventh. The marriage relation between William B. Lewis and Anna Laura Lewis continued until the date of the death of William B. Lewis, to wit, September 25, 1925.

Twelfth. At the time of the death of William B. Lewis the title to each, every, and all of the items of real and personal property set forth and enumerated in paragraph eight above stood in the names of William B. Lewis and Anna Laura Lewis.

Thirteenth. Upon the filing with the collector of internal revenue, the defendant, of said "Return for Federal Estate Tax," the property enumerated and the return thereof made was verified by an internal revenue officer and upon his verification, the collector assessed and required of the plaintiff, the payment of a tax in the sum of eighteen thousand nine hundred fifteen dollars and twelve cents ($18,915.12).

Fourteenth. Upon demand of the defendant the plaintiff on September 10th, 1926, paid to David W. Phillips, collector of internal revenue, twelfth district, Scranton, Pennsylvania, the defendant, the sum of eighteen thousand nine hundred fifteen dollars and twelve cents ($18,915.12) under protest and took his receipt therefor.

Fifteenth. A true and correct copy of said receipt is hereto attached, made a part hereof and marked "Exhibit A."

16 Sixteenth. Coincident with the payment of said tax, to wit, on the 10th day of September, 1926, and in accordance with the act of Congress and the regulations of the Secretary of the Treasury established in pursuance thereof, the plaintiff lodged and filed with the defendant, the collector of internal revenue where the assessment was made, a petition for a refund of the taxes so assessed and collected, to wit, for the sum of eighteen thousand nine

hundred fifteen dollars and twelve cents ($18,915.12). A true and correct copy of the petition for refund is hereto attached, made a part hereof and marked "Exhibit B."

Seventeenth. The petition for a refund mentioned in the next preceding paragraph was, in due course, forwarded by the defendant to the Commissioner of Internal Revenue at Washington, D. C.

Eighteenth. The petition for a refund mentioned in the sixteenth paragraph of this statement of claim was, in accordance with the act of Congress and the regulations of the Secretary of the Treasury established in pursuance thereof, lodged and filed by the plaintiff with the Commissioner of Internal Revenue at Washington, D. C., on or about the 10th day of September, 1926.

Nineteenth. The plaintiff has complied with the provisions of section 3226 of the Revised Statutes as amended by the revenue act of 1924, section 1014, and reenacted by section 1113 of the revenue act of 1926 and the regulations of the Secretary of the Treasury made in pursuance of said section by the lodging of an appeal (claim for refund) made out in due form with the defendant, the proper collector of internal revenue, for the purpose of transmission of the Commissioner of Internal Revenue in the usual course of business under the requirements of the regulations of the Secretary of Treasury which is in legal effect a presentation of the appeal to the commissioner.

Twentieth. More than six months have elapsed since the date of filing such claim for refund without the commissioner having rendered a decision thereon.

Twenty-one-half. The Commissioner of Internal Revenue has decided the claim of your petitioner adversely, to wit:

Twenty-first. The Commissioner of Internal Revenue has refused to allow said petition or repay the said sum of eighteen thousand nine hundred fifteen dollars and twelve cents ($18,915.12) with the interest thereon.

Twenty-second. The assessment and collection of the said sum of eighteen thousand nine hundred fifteen dollars and twelve cents ($18,915.12) against and from the plaintiff by the defendant was and is illegal and erroneous.

(a) Because upon the death of William B. Lewis none of the property mentioned and described in paragraph eight hereof was transferred from William B. Lewis to Anna Laura Lewis, nor was any of the property subject to distribution as part of his estate;

(b) Because none of the property mentioned and enumerated in paragraph eight hereof and held by her and William B. Lewis, her husband, by the entireties, passed to Anna Laura Lewis, the [illegible] upon the death of William B. Lewis, as she took and [illegible] of the entire estate under the original grants [illegible] vesting the estate therein;

(c) Because the property upon which the said tax is based was [illegible] William B. Lewis and Anna Laura Lewis by the entireties [illegible]

(d) Because William B. Lewis and Anna Laura Lewis were husband and wife when the property mentioned and described in paragraph eight hereof vested in them, and since they held the property together as husband and wife, after the death of William B. Lewis, Anna Laura Lewis, the survivor, took the property without acquiring any new rights or any rights of property of William B. Lewis or any rights which she did not before possess;

(e) Because upon the death of William B. Lewis, his interest in said property was annihilated—wiped out—and passed to no one, and on his death Anna Laura Lewis became vested of the property not because there was a transfer of any of the estate, but because she, as survivor, was the representative of the single ownership;

(f) Because of the act of Congress taxes, not the property but the transmission or receipt thereof, and there having been no transmission from Willaim B. Lewis of said property or the receipt thereof by Anna Laura Lewis, there can be no tax;

(g) Because Congress has no power, under the guise of an estate tax, to tax an estate by entireties upon death of one of the parties and in so far as it attempts to do so, the revenue act of 1924 is unconstitutional and void in that it violates the fifth and fourteenth amendments of the Constitution of the United States and attempts to take the property of Anna Laura Lewis without due process of law and without making due compensation therefor.

Wherefore and by reason of the premises, the plaintiff is entitled to the return of eighteen thousand nine hundred fifteen dollars and twelve cents ($18,915.12), together with interest thereon from the 10th day of September, 1926, for the recovery of which this suit is brought.

CHARLES C. LARK,
Attorney for Plaintiff.

[*Duly sworn to by John L. Sheef; jurat omitted in printing.*]

Exhibit A to statement of claim

Treasury Department, U. S. Internal Revenue, Form 805, Revised August, 1925.

Estate Tax Receipt

Executor's Copy

(in duplicate)

Collector 12th district of Pennsylvania at Scranton, Pa. Actual date of payment, Sept. 10, 1926.

NOTE.—Payment upon the basis of the return on Form 706 is not conclusive as to ultimate tax liability. An investigation will be conducted to verify the accuracy of the return. If a deficiency or an

excess payment is disclosed by the commissioner's audit, due notice thereof will be given.

Lewis, William B. Est. of, Dime Trust & Safe Deposit Co., Exrs., Shamokin, Pa.

List 23A, Sept. 26 _____ (Month) (Folio) (Line)

Date of death, Sept. 25, 1925.
Returned tax, $19,428.29.

Interest _____ $_____ (Period rate)

Deficiency tax $_____

Interest & _____ $_____ (Period rate)

All other interest $_____

21 Total paid, $19,428.29; $18,915.12 paid under protest.
Received payment.

_____,
Collector of Internal Revenue.

2-8971 G. P. O.

Collector of Internal Revenue

Paid September 10, 1926, 12th District of Penna.

Exhibit B to statement of claim

CLAIM FOR REFUND OF TAXES ILLEGALLY COLLECTED

STATE OF PENNSYLVANIA,
County of Northumberland, ss:

Lewis, Wm. B., Estate of, Dime Trust & Safe Deposit Co., Executor, Market and Independence Streets, Shamokin, Pa.

This deponent, being duly sworn to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statement are true and complete:

1. Business in which engaged _____
2. Character of assessment or tax, Estate tax.
3. Amount of assessment or stamps purchased, $19,428.29.
22 4. Reduction of tax liability requested (income and profits tax) _____ $_____
5. Amount to be abated _____ $_____
6. Amount to be refunded (or such greater amount as is legally refundable), $18,915.12.

7. Dates of payment (see collector's receipts or indorsements of canceled checks), Sept. 10, 1926.
8. District in which return (if any) was filed, 12th district, Scranton, Penna.
9. District in which unpaid assessment appears.....
10. Amount of overpayment claimed as credit.....
11. Unpaid assessment against which credit is asked; period from ..... to ..... $.....

Deponent verily believes that this application should be allowed for the following reasons:

$18,915.12 was paid under protest and ought to be refunded for the reason that it is illegal, erroneous, and void, (a) because Congress has no power under the guise of State taxes to tax an estate by entireties upon the death of one of the parties; (b) because none of the property held by the entireties passed to Anna Laura Lewis, the survivor, upon the death of Wm. B. Lewis, her husband, as she took and became vested of the entire estate under the original grants; (c) because collection of this tax is taking the property of Anna Laura Lewis, the survivor, without due process of law; (d) because the property upon which the tax is paid was vested in Wm. B. Lewis, and Anna Laura Lewis, his wife, by entireties prior to the passage of the act of Congress under which this tax is assessed and paid; and (e) because in other respects this tax is illegal.

(Signed) JOHN L. SHEEW, [SEAL.]
Treasurer of Dime Trust & Safe Deposit Co., Executor.

Sworn to and subscribed before me this 14th day of September, 1926.

[SEAL.] ROBERT M. FORTNEY,
Notary Public.

My commission expires March 2, 1929.

To the within defendant:

You are required to file an affidavit of defense to this statement of claim within fifteen (15) days from the service hereof.

CHARLES C. LARK,
Attorney for Plaintiff, Shamokin, Penna.

In United States District Court

Motion to amend plaintiff's statement

[Title omitted.]

And now, to wit, the plaintiff by its counsel, Charles C. Lark, moves the court to amend its statement of claim as follows:

First. That the word "eight" in the third line of paragraph twelfth between the words "paragraph" and "above" be stricken out and the word "ninth" inserted in place thereof.

Second. That the word "eight" in the second line of section eight of paragraph twenty-second between the words "paragraph" and

"hereof" be stricken out and the word "ninth" inserted in place thereof.

Third. That the word "eight" in section B of paragraph twenty-second in the first line of page eleven of the statement of claim between the words "paragraph" and "hereof" be stricken out and the word "ninth" inserted in place thereof.

Fourth. That the word "eight" in the third line of section D of paragraph twenty-second between the words "paragraph" and "hereof" be stricken out and the word "ninth" inserted in place thereof.

Fifth. That in paragraph ten, fourth line of words "next preceding," between the word "the" and the word "paragraph" be stricken out and the word "ninth" inserted in the place thereof.

Sixth. That the second ninth paragraph on page eight of the statement of claim be numbered nine and one-half instead of nine.

CHARLES C. LARK,
Attorney for Plaintiff.

And now, to wit, May ——, 1928, the above motion presented and upon consideration thereof it is ordered that the plaintiff's statement of claim be amended as prayed for in the above and foregoing motion.

By the court.

---

25 And now, May 10, 1928, the within motion allowed and the statement of claim amended as therein stated.

ALBERT M. JOHNSON,
District Judge.

Filed May 10, 1928, A. O. Vorse, Clerk.

In United States District Court

Affidavit of defense

COMMONWEALTH OF PENNSYLVANIA,
County of Lackawanna, ss:

David W. Phillips, being duly sworn according to law, declares and says that he is the defendant in the above-entitled cause and that he has a just, true, and legal defense to the whole of the plaintiff's claim of the character and nature as follows:

I

The averments in paragraph first to eight, inclusive, and in paragraph eleventh to twenty-first, inclusive, are admitted.

II

The averments in paragraph ninth are admitted except those contained in subdivisions (12) and (13) of said paragraph ninth, as

to which the defendant has no knowledge, and can neither admit nor deny, but leaves the plaintiff to prove the same.

III

The averments in paragraph ninth (the second paragraph so designated) are denied and in answer thereto the defendant
26 alleges and avers and expects to prove at the trial of this cause that the Commissioner of Internal Revenue determined the value of the said property at $596,086.28 instead of $596,627.93 as alleged in said paragraph ninth.

IV

The averments in paragraph tenth are admitted except those as to the checking account and household furniture referred to in subdivisions (12) and (13) of paragraph ninth, as to which the defendant has no knowledge, and can neither admit nor deny, but leaves the plaintiff to prove the same.

V

The averments of paragraph twenty-second are denied and in answer thereto the defendant alleges and avers and expects to prove at the trial that the full value of the property jointly owned by the decedent and his wife or owned by them as tenants by the entirety was properly included in the decedent's gross estate under the provisions of section 302 (e) of the revenue act of 1924.

VI

And further answering, the defendant says that the assessments and collections of estate taxes herein referred to and each and all of them were in all respects legal and valid and that they were made pursuant to the provisions and requirements of the revenue act of 1924.

I, therefore, owe the plaintiff nothing.

27 All of the above statements are correct and true and the defendant avers and expects upon the trial of this cause to be able to prove the same.

DAVID W. PHILLIPS.

Sworn and subscribed before me this 15th day of March, 1928.

S. W. HUFFORD, *Dep. Clerk.*

In United States District Court

Stipulation to try without jury

And now, to wit, May 9, 1928, it is agreed between counsel for the plaintiff and counsel for the defendant, that the above-stated case

shall be heard by the court without a jury on the facts as agreed upon.

CHARLES C. LARK,
Attorney for Plaintiff.
JAMES SMITH,
Special Attorney,
A. B. DUNSMORE,
U. S. Attorney,
Attorneys for Defendant.

In United States District Court

Bill of exceptions

Be it remembered that on the trial of this cause in this court at the regular January, A. D. 1928, term thereof, holden at the city of Scranton, Pennsylvania, before the Honorable Albert W. Johnson, district judge, the following proceedings were had:

The services of a jury were waived by written stipulation filed with the clerk and the cause was tried to the court without a jury on the 10th day of May, A. D. 1928.

28 The following proceedings were had at the trial:

Appearances: For plaintiff, Charles C. Lark, Esq., attorney for plaintiff; for defendant, Andrew B. Dunsmore, Esq., United States attorney, attorney for defendant.

At the trial the following stipulation of facts was filed by the parties through their respective counsel:

[Title omitted.]

Appearances: For plaintiff, Charles C. Lark, Esq.; for defendant, Andrew B. Dunsmore, Esq., U. S. attorney; A. A. Vosburg, Asst. U. S. attorney.

Stipulation of facts

And now, to wit, May 9, 1928, it is agreed between counsel for the plaintiff and counsel for the defendant that the following are
29 the facts in the above-stated case, the parties hereto reserving the right, however, to introduce into evidence such further facts not inconsistent herewith as they may deem advisable.

1st. William B. Lewis was, at and before the time of his death, a resident and citizen of the State of Pennsylvania, and resided and was domiciled in the township of Shamokin, county of Northumberland, and State of Pennsylvania.

2nd. By his last will and testament, bearing date of August 8, 1925, since his death duly probated and remaining on file in the office of the register of wills of Northumberland County, Pennsylvania, recorded in the office of said Register of Wills Book 19, page 472, William B. Lewis appointed the Dime Trust and Safe Deposit Company to be the executor thereof.

3rd. William B. Lewis died testate at Shamokin Township, Northumberland County, Pennsylvania, on September 25, 1926.

4th. After the death of William B. Lewis, and the probate of his will, Dime Trust & Safe Deposit Company duly qualified as the executor of said last will and testament; letters testamentary on the estate of said decedent have been granted to Dime Trust and Safe Deposit Company and it is now acting as such executor.

5th. On or about August 5, 1926, Dime Trust & Safe Deposit Company, the executor of the last will and testament of William B. Lewis, deceased, filed with the defendant, David W. Phillips, collector of internal revenue, twelfth collection district, at Scranton, Pa., its "Return for Federal Estate Tax, in duplicate."

30 6th. The return of property included in Schedule D-1 "Jointly owned property" was made by the plaintiff under protest.

7th. The return of jointly owned property included in Schedule D-1 is as set out in the 9th paragraph of the plaintiff's statement of claim.

8th. (a) Items 1, 2, 3, 6, 7, 8, and 9 mentioned in paragraph 9th of the plaintiff's statement of claim were acquired by William B. Lewis and Anna Laura Lewis, his wife, prior to the passage of the revenue act of 1924 of June 2, 1924.

(b) Item 4, consisting of preferred stock in William F. Taubal, Inc., while dated September 18, 1924, was acquired by William B. Lewis and Anna Laura Lewis, his wife, on September 10, 1921; the certificates dated September 18, 1924, having been issued in place of similar certificates of stock in the same corporation by reason of a change of the name of the corporation, the former certificate having been issued on September 10, 1921.

(c) Item 5 of paragraph 9, consisting of twenty (20) $1,000.00 Roaring Creek Water Company mortgage bonds, due 1959, were acquired September 6, 1924. They were purchased out of funds of William B. Lewis or Anna Laura Lewis on deposit in Dime Trust & Safe Deposit Company.

(d) Item No. 11, consisting of saving account No. 3329 in Dime Trust & Safe Deposit Company, standing in the name of William B. Lewis or Anna L. Lewis, at the time of Mr. Lewis's death, showed a balance of $47,962.80, and the accrued interest

31 thereon was $812.33. This savings account was opened in 1910 in the names of William B. Lewis or Anna Laura Lewis.

(e) Item No. 12, of said paragraph 9th of plaintiff's statement of claim, consisting of a checking account standing in the name of William B. Lewis or Anna Laura Lewis, in Dime Trust and Safe Deposit Company, at the time of Mr. Lewis' death, showed a balance of $1,566.66. This account was opened in the names of William B. or Anna Laura Lewis in 1910.

[illegible] mentioned in Item 12 of paragraph 9 of the plaintiff's statement of claim, the value of which was finally determined by the commissioner at $2,975.00, was purchased with funds of William B. Lewis and Anna Laura Lewis, about 1920, from the savings account in Dime Trust & Safe Deposit Company.

(g) Item 10 mentioned in the 9th paragraph of plaintiff's statement of claim, the same being a note in the sum of $10,000.00 dated May 4, 1925, was taken by William B. Lewis and Anna Laura Lewis for funds loaned out of their savings account in Dime Trust and Safe Deposit Company, accumulated prior to June 2, 1924.

9th. The value for assessment purposes, as finally determined by the commissioner, of the items mentioned in paragraph 9th of the plaintiff's statement of claim, was $[illegible]28.

10th. William B. Lewis and Anna Laura Lewis were married in 1896, and the marriage relation continued until the date of the death of William B. Lewis on September 25, 1925.

11th. At the time and times of the vesting of the title to each, every, and all of the several items of property of William B. Lewis and Anna Laura Lewis, enumerated and set forth in paragraph 9 of the statement of claim, William B. Lewis and Anna Laura Lewis were husband and wife.

12th. The title to each, every, and all of the items of real and personal property set forth and enumerated in paragraph 9th of the statement of claim, excepting the furniture, stood in the names of William B. Lewis and Anna Laura Lewis from the date of the inception of the title of the various items of property until the date of his death.

13th. The tax assessed by the commissioner, and paid to the collector, on the jointly owned property as enumerated in paragraph 9 of the plaintiff's statement of claim was $18,915.12, which was paid to the collector on September 10, 1926, under protest.

14th. The copy of the receipt of the collector to the plaintiff, attached to plaintiff's statement of claim, marked "Exhibit A," is a true and correct copy of the receipt given by the collector to the plaintiff for said tax.

15th. On September 10, 1926, in accordance with the act of Congress and the regulations of the Secretary of the Treasury established in pursuance thereof, the plaintiff filed with the collector a claim for refund of the taxes so assessed and collected, to wit, for the sum of $[illegible], a true and correct copy of said claim being attached to the statement of claim and marked "Exhibit B." The claim for refund was in due course transmitted by the defendant to the Commissioner of Internal Revenue at Washington, D. C.

16th. [illegible] for a refund was, in accordance with the [illegible] and the regulations of the Secretary of the Treasury established in pursuance thereof, lodged and filed with the Commissioner of Internal Revenue in Washington, D. C., on [illegible], 1926.

[illegible]

17th. More than six months have elapsed since the filing of the claim for refund without the [illegible] a decision thereon, and accordingly the [illegible] said claim for refund in its entirety.

[illegible]
Attorney for the Defendant.

[illegible]

At the close of the trial the defendant submitted the following motion for judgment.

Motion for judgment.

Now comes the defendant and moves the court for judgment against the plaintiff dismissing the plaintiff's statement of claim filed herein and to recover from said plaintiff the costs herein expended for the reason that there is not sufficient evidence to warrant judgment in favor of the plaintiff.

ANDREW B. DUNMORE,
United States Attorney, Attorney for Defendant.

34 The cause was then argued by counsel for the respective parties.

Defendant's motion for judgment was overruled and an exception noted.

Thereafter and on the 2nd day of February, 1929, the following findings of fact, opinion, and order were rendered and filed in this cause with exceptions saved to the defendant:

FINDINGS OF FACT AND OPINION

(Filed February —, 1929)

In United States District Court, for the Middle District of Pennsylvania

No. 2080, January Term, 1928. Assumpsit

DIME TRUST & SAFE DEPOSIT COMPANY, EXECUTOR OF THE LAST WILL and testament of William B. Lewis, deceased

vs.

DAVID W. PHILLIPS, COLLECTOR OF INTERNAL REVENUE, FIFTH DISTRICT

Opinion of the Court

This is an action of assumpsit brought by the Dime Trust & Safe Deposit Company, plaintiff, against David W. Phillips, [illegible]

of internal revenue, 12th District, defendant, to recover the sum of $16,915.12 which was paid to the collector of internal revenue, under protest, on September 10th, 1926, with interest from September 10, 1926.

35 The facts in this case have been agreed upon in a case stated which has been submitted to the court for trial and decision without a jury. The case stated and the facts agreed upon are as follows:

"And now, to wit, May 9, 1928, it is agreed between counsel for the plaintiff and counsel for the defendant that the following are the facts in the above-stated case, the parties hereto reserving the right, however, to introduce into evidence such further facts not inconsistent herewith as they may deem advisable.

"1st. William B. Lewis was, at and before the time of his death, a resident and citizen of the State of Pennsylvania, and resided and was domiciled in the township of Shamokin, county of Northumberland, and State of Pennsylvania.

"2nd. By his last will and testament, bearing date of August 8, 1925, since his death duly probated and remaining on file in the office of the register of wills of Northumberland County, Pennsylvania, recorded in the office of said register in will book 19, page 472, William B. Lewis appointed the Dime Trust and Safe Deposit Company to be the executor thereof.

"3rd. William B. Lewis died testate at Shamokin Township, Northumberland County, Pennsylvania, on September 25, 1925.

"4th. After the death of William B. Lewis and the probate of his will Dime Trust & Safe Deposit Company duly qualified as the executor of said last will and testament; letters testamentary on the estate of said decedent have been granted to Dime Trust & Safe Deposit Company, and it is now acting as such executor.

36 "5th. On or about August 5, 1926, Dime Trust & Safe Deposit Company, the executor of the last will and testament of William B. Lewis, deceased, filed with the defendant, David W. Phillips, collector of internal revenue, twelfth collection district, at Scranton, Pa., its 'Return for Federal estate tax, in duplicate.'

"6th. The return to property included in Schedule D-1, 'Jointly owned property,' was made by the plaintiff under protest.

"7th. The return of jointly owned property included in Schedule D-1 is as set out in the 9th paragraph of the plaintiff's statement of claim.

"8th. (a) Items 1, 2, 3, 6, 7, 8, and 9, mentioned in paragraph 9th of plaintiff's statement of claim, were acquired by William B. Lewis and Anna Laura Lewis, his wife, prior to the passage of the revenue act of 1924, to wit, June 2, 1924.

"(b) Item 4, consisting of preferred stock in William F. Taubel, Inc., which dated September 18, 1924, was acquired by William B. Lewis and Anna Laura Lewis, his wife, on September 10, 1921, the certificates dated September 18, 1924, having been issued in place of similar certificates of stock in the same corporation by reason of a

change of name of the corporation, the former certificate having been issued on September 10, 1921.

"(c) Item 5 of paragraph 9, consisting of twenty (20) $1,000.00 Roaring Creek Water Company mortgage bonds, due 1926, were acquired September 6, 1924. They were purchased out of funds of William B. Lewis or Anna Laura Lewis on deposit in Dime Trust and Safe Deposit Company.

87 "(d) Item No. 11, consisting of savings account No. 2028 in Dime Trust & Safe Deposit Company, standing in the name of William B. Lewis or Anna L. Lewis at the time of Mr. Lewis' death, showed a balance of $47,962.80 and the accrued interest thereon was $812.33. This savings account was opened in 1910, in the name of William B. Lewis or Anna Laura Lewis.

"(e) Item No. 12 of said paragraph 9th of plaintiff's statement of claim, consisting of a checking account standing in the name of William B. Lewis or Anna Laura Lewis, in Dime Trust & Safe Deposit Company, at the time of Mr. Lewis' death showed a balance of $1,566.66. The account was opened in the names of William B. or Anna Laura Lewis in 1910.

"(f) The household furniture mentioned in item 13 of paragraph 9 of the plaintiff's statement of claim, the value of which was finally determined by the commissioner at $2,975.00, was purchased with funds of William B. Lewis and Anna Laura Lewis, about 1920, from the savings account in Dime Trust and Safe Deposit Company.

"(g) Item 10 mentioned in the 9th paragraph of plaintiff's statement of claim, the same being a note in the sum of $10,000.00, date May 4, 1925, was taken by William B. Lewis and Anna Laura Lewis for funds loaned out of their savings account in Dime Trust & Safe Deposit Company accumulated prior to June 2, 1924.

"9th. The value for assessment purposes, as finally determined by the commissioner, of the items mentioned in paragraph 9th of the plaintiff's statement of claim was $596,066.23.

88 "10th. William B. Lewis and Anna Laura Lewis were married in 1886, and the marriage relation continued until the date of the death of William B. Lewis on September 25, 1925.

"11th. At the time and times of the vesting of the title to each, every, and all of the several items of property of William B. Lewis and Anna Laura Lewis enumerated and set forth in paragraph 9 of the statement of claim William B. Lewis and Anna Laura Lewis were husband and wife.

"12th. The title to each, every, and all of the items of real and personal property set forth and enumerated in paragraph 9th of the statement of claim, excepting the furniture, stood in the names of William B. Lewis and Anna Laura Lewis from the date of the inception of the title of the various items of property until the date of his death.

"13th. The tax assessed by the commissioner, and paid to the collector, on the jointly owned property as enumerated in paragraph 9

of the plaintiff's statement of claim was $18,915.12, which was paid to the collector on September 10th, 1926, under protest.

"14th. The copy of the receipt of the collector to the plaintiff, attached to plaintiff's statement of claim, marked "Exhibit A," is a true and correct copy of the receipt given by the collector to the plaintiff for said tax.

"15th. On September 10, 1926, in accordance with the act of Congress and the regulations of the Secretary of the Treasury established in pursuance thereof, the plaintiff filed with the collector a claim for refund of the taxes so assessed and collected, to-wit, for the sum of $18,915.12, a true and correct copy of said claim being attached to the statement of claim and marked "Exhibit B2." The claim for refund was, in due course, forwarded by the defendant to the Commissioner of Internal Revenue at Washington, D. C.

"16th. The claim for a refund was, in accordance with the act of Congress and the regulations of the Secretary of the Treasury established in pursuance thereof, lodged and filed with the Commissioner of Internal Revenue in Washington, D. C., on or about September 10, 1926.

"17th. More than six months have elapsed since the date of filing the claim for refund without the commissioner having rendered a decision thereon, and subsequently the commissioner has rejected said claim for refund in its entirety."

Section 301-a and section 302-c of title 3, part 1, estate tax, of the act of June 2nd, 1924, constitute the provisions of the law under which the tax in question was assessed and collected. These sections, in so far as they are pertinent, provide as follows:

"Section 301. (a) In lieu of the tax imposed by Title IV of the revenue act of 1921, a tax equal to the sum of the following percentages of the value of the net estate (determined as provided in section 303) is hereby imposed upon the transfer of the net estate of every decedent dying after the enactment of this act, whether a resident or nonresident of the United States.

"Section 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

"(c) To the extent of the interest therein held as joint tenants by the decedent and any other person, or as tenants by the entirety by the decedent and spouse, or deposited with any person carrying on the banking business, in their joint names and payable to either or the survivors, except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than a fair consideration in money or money's worth."

The question presented to the court for decision is, whether the personal and real property owned and held by William B. Lewis and Anna Laura Lewis, husband and wife, as tenants by entireties

under the laws of Pennsylvania, is taxable under the provisions of the act of Congress cited, was the death of the husband, December 25th, 1925.

The Government is endeavoring to tax the interest of one tenant by entirety at his decease on its transfer to the wife, the other tenant by entirety. Under the laws of Pennsylvania there is no transfer or passing of any interest or estate from one tenant by entirety to the other on the death of either. The estate of tenants by entireties is a unit and not divisible; the whole continues in the survivor and the estate of a deceased tenant by entirety ceases and is not transferred.

In Stuckey *vs.* Keefe's Executors, 26 Pa., 397, the tenancy of husband and wife by entireties was defined by the Supreme Court of Pennsylvania, and the legal consequence of such tenancy stated by Lewis, chief justice, as follows:

"A conveyance to husband and wife creates neither a tenancy in common nor a joint tenancy. The estate of joint tenants is
.41 a unit made up of divisible parts; that of husband and wife is also a unit, but it is made up of indivisible parts. In the first case there are several holders of different moieties or portions, and upon the death of either the survivor takes a new estate. He acquires by surivorship the moiety of his deceased cotenant. In the last case, although there are two natural persons, they are but one person in law, and upon the death of either the survivor takes no new estate. It is a mere change in the properties of the legal person holding and not an alteration in the estate holden. The loss of an adjunct merely reduces the legal personable holding the estate to an individuality identical with the natural person. The whole estate continues in the survivor the same as it would continue in a corporation after the death of one of the corporation. 1 Dana 244; 7 Yeager 319. This has been the settled law for centuries. The distinction may seem a nice one, but it is founded upon the nature of marriage and the rights and incapacities which it establishes. Co. Lit. 6; 1 Thom. Coke 853; 2 Bl. Com. 182; 5 T. R. 652; 2 Vern 238; Skin. 182; 19 Wend. 175; 3 Rand. 184; 5 John. Ch. R. 438; 7 Yeager 319; 1 Barr 176; 6 W. & Ser. 319."

In Beihl *vs.* Martin, 236 Pa. 519, Mr. Justice Stewart, delivering the opinion of the Supreme Court of Pennsylvania, states the nature of an estate by entireties in Pennsylvania in the following language:

"It may be that because of modern innovations on the common law respecting the property rights of married women, the venerable estate known as estate by entireties has outlived the purpose of its creation and is out of harmony with present conditions. How-
ever this may be, if change is desired it must come through
.42 legislative action and not through judicial construction. This estate is too well established and too well defined to be subject to judicial impertinence. Recognizing its very ancient character, we have been entitled, as all our cases show, to give effect to those peculiar incidents which naturally and logically attach, and

chiefly to its chief distinguished incident which exempts it from the ordinary legal process to which all other estates are subject. Fundamentally the estate rests on the legal unity of husband and wife; it is therefore a unit, not made up of divisible parts subsisting in different natural persons, but is an indivisible whole, vested in two persons actually distinct, yet to legal intendment one and the same. Each is seised of the whole estate from its inception, and upon the death of one, while the right of survivorship remains to the other, that other takes no new title or estate. 'A conveyance to husband and wife creates neither a tenancy in common nor a joint tenancy. The estate of joint tenants is a unit made up of divisible parts; that of husband and wife is also a unit, but it is made up of indivisible parts. In the first case there are several holders of different moieties or portions, and upon the death of either the survivor takes a new estate. He acquires by survivorship the moiety of his deceased cotenant. In the last case, although there are two natural persons, they are but one person in law, and upon the death of either the survivor takes no new estate. It is a mere change in the properties of the legal person holding and not an alteration in the estate holden. The loss of an adjunct merely reduces the legal personage holding the estate to an individuality identical with the natural person. The whole estate continues in the survivor the same as it would continue in a corporation after the death of one of the corporators. This has been the settled law for centuries'; Stuckey vs. Keefe, 26 Pa. 397."

In Gasner, appellant, vs. Pierce et al., 286 Pa. 529, Mr. Justice Sadler, speaking for the Supreme Court of Pennsylvania, defined an estate by entireties as follows:

"The property in question was admittedly owned by Mr. and Mrs. Pierce, and, as a result, a tenancy by entireties arose, which has been defined as an interest held by a husband and wife together so long as both live, and after the death of either by the survivor so long as the estate lasts: 13 R. C. L. 1096. 'The essential characteristic of (the estate) is that each spouse is seized of the whole or the entirety and not of a share moiety, or divisible part. There is but one estate, and, in contemplation of law, it is held by but one person': 30 C. J. 564; 13 R. C. L. 1114. This interest, arising from the unity of person, has not been abolished by our so-called married women's acts (13 R. C. L. 1101) passed April 11, 1848, P. L. 536 (Diver vs. Diver, 56 Pa. 106), June 3, 1887, P. L. 382 (Bramberry's Estate, 150 Pa. 626), or June 8, 1893, P. L. 344; Myer's Est. (No. 1), 238 Pa. 80. Nor is it affected by the more recent legislation (May 24, 1923, P. L. 443; May 13, 1925, P. L. 5649) authorizing the sale of such estates, when ordered to secure support of the wife, or after divorce has been granted.

"Neither husband nor wife, in whom property has jointly vested, can sell or assign their individual rights therein without the joinder of the other, or dispose even of the expectancy of survivorship (Reihl vs. Martin, 286 Pa. 519) and creditors of either acquire

no enforceable lien by [illegible] execution. McCurdy *vs.* [illegible] such party to the present [illegible] insurance, is not to a part, but to all of it. [illegible] Myer's Estate (No. 2), [illegible]

Under the law in Pennsylvania an estate by entirety [illegible] indivisible and on the death of either spouse the estate is [illegible] and no new estate is acquired by the survivor. The [illegible] sylvania must be accepted as the law in this case so far as it relates to the nature and incidents of an estate by entireties. Chaffin *vs.* Clarke, 178 U. S. 186.

Since under the law of Pennsylvania an estate by entireties is a unit and indivisible and upon the death of one of the tenants the interest or estate of the deceased tenant cease and there is no transfer of any estate, or any part thereof, to the survivor, the survivor has the entire estate and takes no new estate. The value of such estate may not be included in the gross estate of the decedent and hence there is nothing upon which to impose an estate tax under the revenue act of 1924.

This position is supported by the decisions of the United States Board of Tax Appeals and Appeal of George R. Dyer, H. Kierstede Hudson, and T. Hendry Walter, executors of estate of Charles L. Hudson, 5 U. S. Board of Tax Appeals Reports, 711; appeal of James C. Murphy and Mercantile Trust & Deposit Co., of Baltimore, executors estate of John H. Windfelder, 5 U. S. Board of Tax Appeals Reports, 952; appeal of Provident Trust Company of Philadelphia and Charles Sinkler, administrators estate of James K. Young, 5 U. S. Board of Tax Appeals Reports, 1004; appeal of Harry A. Smith and Ethel G. Meisel, executors estate of Edward Meisel, petitioners, *vs.* Commissioner of Internal Revenue, respondent, 6 U. S. Board of Tax Appeals Reports, 541; and also by opinion of Coleman, district judge, in James E. Tyler, jr., and William G. Tyler, administrators of the estate of James E. Tyler, deceased, *vs.* United States of America, in the District Court of the United States for the District of Maryland, filed October 19, 1928.

In appeal of the Provident Trust Company of Philadelphia and Charles Sinkler, administrators estate of James K. Young, supra, it was held that "The common-law doctrine of estates by the entirety obtains in Pennsylvania, and as, under the common law, there was no transfer of such estate to the surviving spouse upon the death of the decedent, the value of such estate may not be included in the gross estate of the decedent."

The conclusion of the court is that the property in question was vested in the decedent and his wife as tenants by entireties; that there was no transfer of any interest or estate to the wife upon the death of the decedent, and consequently there was nothing to which a Federal estate tax could apply.

If it be held that the revenue act cited is intended to apply to estates by entireties in Pennsylvania, the court would be compelled

to hold that the result of the reference act as applies to the taxation of estates by collectors in Pennsylvania is in violation of section 2, [illegible] clause 2, and section 9, clause 4, of Article I of the Federal Constitution and the 5th amendment to the Constitution.

Tyler vs. United States of America, supra. It, therefore, follows that the tax in question was illegally collected and must be returned to the plaintiff, with interest.

And now, February 2, 1929, it is ordered that the plaintiff, the Dixie Trust & Safe Deposit Company, have judgment against the defendant, David W. Phillips, collector of internal revenue, 12th district, for the sum of $18,915.12 with interest at six per centum per annum, from September 10th, 1926.

By the court.

ALBERT W. JOHNSON,
District Judge.

In United States District Court

Order settling bill of exceptions

And now in furtherance of justice and that right may be done, and inasmuch as the matters and things above set forth do not appear of record in said cause and to the end that the same may be preserved in the record and presented to the honorable United States Circuit Court of Appeals for the Third Circuit, the defendants tenders and presents the foregoing as his bill of exceptions in this case and prays that the same may be allowed, settled, signed, sealed, made a part of the record, and ordered filed, which is accordingly done this 20th day of May, A. D. 1929, after presentation to opposing counsel for inspection and within the period which an appeal may lie from the judgment of the court in this cause, entered on March first, A. D. 1929.

ALBERT W. JOHNSON,
Judge of the District Court of the United States for the Middle District of Pennsylvania.

47 In United States District Court

Praecipe for judgment

Enter judgment in accordance with the opinion of Judge Johnson, filed February 2, 1929, in the above-stated case for the sum of Twenty-One Thousand Seven Hundred Fourteen Dollars and fifty-five cents ($21,714.55), as follows:

The amount of internal revenue paid	$18,915.12
Interest from Sept. 10, 1926, to February 28, 1929 (2 yrs., 5 mo., 18 days)	2,799.43
Total	21,714.55

CHARLES C. LARK,
Attorney for Plaintiff.

To A. O. Vorse, clerk, February 28, 1929.

In United States District Court

Judgment

March 1, 1929, judgment entered in favor of the [illegible] Trust & Safe Deposit Company, and against the defendant, David W. Phillips, collector of internal revenue, for the [illegible] the sum of $18,915.12, with interest from Sept. 10, 1926, in the sum of $2,799.43, making a total of $21,714.55.

A. O. Voss, *Clerk.*

48 In United States District Court

Certificate of probable cause

And now on this 20th day of May, A. D. 1929, the court, having been fully advised in the premises, hereby certifies that inasmuch as it appears of record in this case that the collector of internal revenue was acting pursuant to instructions from the Commissioner of Internal Revenue, there was probable cause for the collection of Federal taxes and interest thereon from the plaintiff, as shown by the record in this cause.

Albert W. Johnson,
District Judge for the Middle District of Pennsylvania.

In United States District Court

Assignments of error

Now comes the defendant, above named, David W. Phillips, collector of internal revenue for the twelfth collection district, and asks that the order and judgment entered in the above case be held to be erroneous for the following reasons:

First. The learned court erred in holding as follows:

"The conclusion of the court is that the property in question was vested in the decedent, and his wife as tenants by entireties; that there was no transfer of any interest or estate to the wife upon the death of the decedent and consequently there was nothing to which a Federal estate tax could apply."

Second. The learned court erred as follows:

"It, therefore, follows that the tax in question was illegally collected and must be returned to the plaintiff, with interest."

Third. The learned court erred as follows:

49 "Since under the law of Pennsylvania an estate by entireties is a unit and indivisible and upon the death of one of the tenants the interest or estate of the deceased tenant ceases and there is no transfer of any estate, or any part thereof, to the survivor, the survivor has the entire estate and takes no new estate. The value

of such estate may not be included in the gross estate of the decedent and hence there is nothing upon which to impose an estate tax under the revenue act of 1924."

Fourth. The learned court erred in entering the following order, to wit:

"And now, February 2, 1929, it is ordered that the plaintiff, the Dime Trust & Safe Deposit Company, have judgment against the defendant, David W. Phillips, collector of internal revenue, 12th district, for the sum of $18,914.13 with interest at six per centum per annum, from September 10th 1926.

By the court,

ALBERT W. JOHNSON,
District Judge."

Fifth. The entry of judgment in favor of the plaintiff and against the defendant in the sum of twenty-one thousand seven hundred fourteen dollars and fifty-five cents ($21,714.55) was erroneous.

ANDREW B. DUNSMORE,
A. A. VOSBURG,
Attorneys for Appellant.

50 In United States District Court

Petition for appeal

To the Honorable ALBERT W. JOHNSON, *District Judge:*

The petition of David W. Phillips, defendant, respectfully represents:

First. He is the collector of internal revenue for the twelfth district of Pennsylvania and this suit was brought against him to recover the sum of eighteen thousand nine hundred and fifteen dollars and twelve cents ($18,915.12), which was paid under protest on September 10th, 1926, together with interest thereon.

Second. That defense was made by your petitioner and the case fully heard before this honorable court.

Third. That on February 2, 1929, this court filed an opinion holding in favor of the plaintiff and against the defendant and directing that judgment be entered accordingly.

Fourth. That by praecipe filed judgment was entered in favor of the plaintiff and against the defendant on March 1st, 1929, in the sum of twenty-one thousand seven hundred fourteen dollars and fifty-five cents ($21,714.55).

Fifth. Your petitioner conceiving himself aggrieved by the order of court, and the judgment entered thereon, does hereby appeal from the said order and judgment to the United States Circuit Court of Appeals for the Third Circuit for the reasons specified in the assign-

ments of arrest, which are duly authenticated, may be sent
51 after be filed, and prays that the said appeal may be allowed
and that the proceedings and papers upon which said judg-
ment, order and judgment were made, duly authenticated, may be sent to
the United States Circuit Court of Appeals for the Third Circuit.

And your petitioner will ever pray.

ANDREW B. DUNMORE,
A. A. VOSBURG,
Attorneys for Appellant.

[*Duly sworn to by David W. Phillips; jurat omitted in printing.*]

52 [Citation in usual form showing service on John L. Sheaf omitted in printing.]

53 In United States District Court

Order allowing appeal

And now, May 14th, 1929, appeal allowed as prayed for.

By the court,

ALBERT W. JOHNSON,
District Judge.

In United States District Court

Stipulation for printing the record

It is hereby stipulated and agreed by and between Charles C. Lark, attorney for the plaintiff, and Andrew B. Dunmore, United States attorney for the middle district of Pennsylvania, and A. A. Vosburg, assistant United States attorney for the middle district of Pennsylvania, attorneys for the defendant, that the following be printed, and constitute the record on appeal in the above case before the United States Circuit Court of Appeals for the Third Circuit:

1. Docket entries.
2. Summons.
3. Statement of claim, including exhibits thereto attached.
54 4. Amended statement of claim.
5. Affidavit of defense.
6. Stipulation waiving jury trial.
7. Bill of exceptions.
8. Praecipe for judgment.
9. Judgment.
10. Certificate of probable cause.
11. Assignment of errors.

13. Petition for appeal and order allowing appeal.
14. This stipulation.
15. Certificate of the clerk of the district court.

ATTORNEY FOR PLAINTIFF.
ARTHUR B. DUNSMORE,
United States Attorney for the Middle District of Pennsylvania.
A. A. VOSBURG,
Assistant United States Attorney for the Middle District of Pennsylvania,
Attorneys for the Defendant.

55 [Clerk's certificate to foregoing transcript omitted in printing.]

56 [Minute entry of argument and submission, Dec. 4, 1930, omitted in printing.]

57 In United States Circuit Court of Appeals for the Third Circuit

OCTOBER TERM, 1930

No. 4142 (Last No. 93).

D. W. PHILLIPS, COLLECTOR, APPELLANT

vs.

DIME TRUST & SAFE DEPOSIT CO., EXECUTOR, W. B. LEWIS, DEC'D., appellee

Order assigning judge filed Dec. 4, 1930

On appeal from the District Court of the United States for the Middle District of Pennsylvania.

And now, to wit, this 4th day of December, A. D. 1930, it is ordered that Hon. J. Whitaker Thompson, district judge for the eastern district of Pennsylvania, and Hon. ———, district judge, for the ——— district of ———, be, and he is hereby, assigned to sit in above case hereafter to make a full court.

JOSEPH BUFFINGTON, *Circuit Judge.*

[File endorsement omitted.]

In United States Circuit Court of Appeals
Third Circuit

No. 4148, October Term, 1935

DAVID W. PHILLIPS, COLLECTOR OF INTERNAL REVENUE, Fourth District, defendant-appellant

vs.

DIME TRUST & SAFE DEPOSIT COMPANY, Executors of the Last Will and Testament of William B. Lewis, late of [illegible], Northumberland County, Pennsylvania, deceased, plaintiff-appellee

On Appeal from the District Court of the United States for the Middle District of Pennsylvania

Before BUFFINGTON, WOOLLEY, and THOMPSON, Circuit Judges.

Certificate to the Supreme Court filed Feb. [illegible], 1936

In order that it may properly decide this case the Circuit Court of Appeals for the Third Circuit desires the instruction of the Supreme Court. Therefore, under authority of section [illegible] Judicial Code, it certifies three questions of law which arise from the following facts:

STATEMENT OF FACTS

William B. Lewis had been a citizen of the State of Pennsylvania. On his death in 1935 he and his wife, Anna Dunlap Lewis, were seized and possessed of thirteen pieces or parcels of real and personal property which on sundry dates they had acquired as tenants by the entirety. The executor of the will of William B. Lewis, duly presenting, included these properties in the [illegible] return filed under the revenue act of 1924, and still [illegible], paid the taxes levied and assessed on their full valuations. The executor has now brought this suit in a district court to recover the amounts of taxes so computed and paid, on the claim that it had been unlawfully exacted and collected because violative of the Pennsylvania [illegible] respect to intestacies by the statutory law, on which the [illegible] adjustment. That was before the decision in Tyler vs. United [illegible] 281 U. S. [illegible].

The thirteen properties [illegible] fall into three [illegible] class. The [illegible]

[illegible] in the Dime Trust & Safe Depo[illegible] and in that name acquired, in 1910 and contin[illegible] of the husband.

The questions of law growing out of the foregoing facts up[illegible] which the Circuit Court of Appeals desires the instruction of t[illegible] Supreme Court are these:

QUESTIONS CERTIFIED.

1. Does section 302 of the revenue act of 1924 require that [illegible] value of property held by husband and wife as tenants by the [illegible] always existing prior to the effective date of the revenue act of 19[illegible] be included in the gross estate of the tenant first dying for the pu[illegible] of the Federal estate tax?

2. Does section 302 of the revenue act of 1924 require that [illegible] value of property held by husband and wife as tenants by the [illegible] tirety, acquired prior to the effective date of that act but after t[illegible] effective date of the revenue act of 1916, be included in the gro[illegible] estate of the tenant first dying for the purpose of the Federal est[illegible] tax?

3. If the answer to either question be in the affirmative, had t[illegible] Congress power to extend the cited taxing provision to such [illegible] as acquired?

JOSEPH BUFFINGTON,
VICTOR B. WOOLLEY,
J. WHITAKER THOMPSON,
Circuit Judges.

[illegible] omitted.)

[illegible] additions to foregoing transcript omitted [illegible] printing.

JAMES P. KINNEY,
Deputy Clerk of the United States Circuit Court of Appeals, Third Circuit.